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African Americans and the Criminal Justice System

I wonder if because it is blacks getting shot down, because it is blacks who are going to jail in massive numbers, whether we—the total we, black and white—care as much? If we started to put white America in jail at the same rate that we're putting black America in jail, I wonder whether our collective feelings would be the same, or would we be putting pressure on the president and our elected officials not to lock up America, but to save America?

—Former Atlanta Police Chief Eldrin Bell¹

Imagine that you are a pregnant mother at your first meeting of a childbirth class in Harlem or the east side of Detroit or South Central Los Angeles. All nine members of the class are African American women who, coincidentally, are expecting boys. After a general overview regarding what to expect of pregnancy and childbirth, the teacher tells you all that she also has some news regarding the future of your children—three out of nine of your boys will spend time in prison. While she can't predict which of your boys will be the three, national statistics suggest that this is how their lives will turn out.

This is a rather bleak scenario, of course, and one that is not generally incorporated into childbirth classes—but it is accurate nonetheless. Police Chief Bell's question is quite apt; would Americans permit these circumstances to continue if the odds

were three in nine for boys from other racial and ethnic groups? The answer should be obvious.

At the close of the twentieth century, race, crime, and the criminal justice system were inextricably linked. A walk through nearly any courtroom or prison in the United States reveals a sea of black and brown faces at the defendant's table and in the prison yard. Nearly half of all prison inmates are now African American, and another 19 percent are Hispanic—percentages *far* out of proportion to their numbers in the general population.*

Although we have become so inured to these gross disparities that they seem almost inevitable, in point of fact they mirror other historical trends. As European immigrant groups swept into the United States at the turn of the century, their involvement in crime and the criminal justice system was disproportionate to their numbers in the population. Many of the same fears voiced today about African Americans were raised then about the immigrants; writings of the time reveal that the connection between immigration and crime had nearly become a "national obsession." For example, a 1911 study by the United States Immigration Commission described various races and nationalities as "exhibiting clearly defined criminal characteristics." Italians were depicted as being prominently involved in crimes of violence, the Irish in drunkenness and vagrancy, and Jews in prostitution and crimes against property.²

This is not to suggest that the criminal justice system and African Americans have not been linked throughout American history. Following the end of slavery in the South, for instance, white planters, businessmen, and politicians devised

* Much of the discussion in this and the following two chapters focuses on African Americans and the criminal justice system. Many of the dynamics in this regard may apply to Hispanics as well, but unfortunately state and federal government surveys are often incomplete or inconsistent in providing data on Hispanics.

new ways to keep the black population subservient and exploited. Historian David Oshinsky describes how the new methods being devised flowed out of the longstanding racist mindset: "Southern whites had long viewed criminal behavior as natural to the Negro. They took his stealing for granted, as a biological flaw."³

Once slaves were freed, they had the "opportunity" to commit crimes beyond the confines of the slave plantation. As more blacks were arrested for crimes, the proportion of blacks among the inmate population soared, as did the number of inmates overall. In a region where many of the prisons had been damaged or destroyed during the war, this created substantial strains on prison systems that had nowhere to house the expanding inmate population. The ingenious solution was the convict leasing system, in which the state contracted with local businessmen and farmers to use the labor of inmates in exchange for providing them with food and housing. In Mississippi, the state initially paid the contractor for taking the prisoners off its hands; later, contractors had to pay a fee for use of the labor.

Compared to slavery, the new system had many economic advantages for the employers:

[The leasing of convict labor] plugged the major weakness of the old system: the high fixed cost of labor. Under the sublease, an employer was not stuck with a set number of prisoners over a long period of time. He did not have to feed, clothe, and guard them when there was little work to be done. He could now lease convicts according to his specific, or seasonal, needs.⁴

From the laborer's point of view, of course, the system was extremely brutal. Oshinsky reports that the annual mortality rate for the convict population in Mississippi in the 1880s ranged

from 9 to 16 percent. The black rate was much higher than the white rate; 126 blacks out of 735 inmates died in 1882, compared to 2 out of 83 whites.⁵

Even with this phenomenon as background, however, by the early twentieth century prison admission records show a very different picture from what we see today. Although we have no firm data on prison admissions for the first quarter of this century, records have been kept consistently since 1926. They indicate that African Americans made up a smaller proportion of those sentenced to prison during the early part of this century than is now the case. Black offenders represented 21 percent of those admitted to prison in 1926, compared to nearly half of all prison admissions today.⁶ How can we account for this rather striking anomaly?

Part of the explanation may lie in the nature of the societal response to crime, of which the formal criminal justice system is only one aspect. Due to patterns of residential segregation, most crime is intraracial. For the most part, people get into fights with their neighbors, break into homes in their communities, and commit sexual assaults against people they know in some capacity. If blacks and whites largely live apart from each other—often in patterns that are more entrenched than a century ago—most offenders will therefore victimize someone of the same race.

Historically, as long as black crime was concentrated within black communities, it was generally of little concern to law enforcement. Blacks were essentially unrepresented among law enforcement officials and political leadership, and so there was little sensitivity or interest in devoting resources to communities viewed as second-class.

When black crime spilled over into white communities, though, or at least was perceived to, the heavy hand of justice was employed to its full extent. Often this had little to do with the formal mechanisms of the justice system, as the several

Most important, while overall unemployment rates were declining in the 1960s, rates of unemployment for nonwhite youth were increasing—as was the proportion of nonwhites not even looking for work. Thus, the official unemployment rate for nonwhite males aged 18-19 rose from 10 percent in 1952 to 20 percent in 1967, while the proportion of nonwhite youth either working or looking for work declined from 80 percent in 1952 to 63 percent by 1967.⁸

These labor market changes alone were sufficient to explain increasing crime rates for youths in the 1960s. Essentially, those young people who are so isolated from the mainstream that they are not even looking for work have little incentive to conform to societal norms, since they do not perceive themselves as having an opportunity to share in the rewards of the working world.

Even among those youth who are engaged in the labor market, but largely confined to low-wage jobs, the phenomenon of “relative deprivation” became a contributing factor to crime.⁹ It was and is not just a question of whether one has enough to eat and survive, but how one’s material standards compare to others’ and to perceptions regarding whether hard work results in appropriate rewards. For example, wealthy people who commit economic crimes clearly are not lacking material rewards, but may view themselves almost in competition with others who are even wealthier.

A GENERATION BEHIND BARS

By the 1980s, we witnessed the remarkable result of some of the positive changes set in motion during the 1960s: The ranks of the black middle class expanded during these years and, while racism hardly disappeared, substantial numbers of African American families began populating suburban areas and sending their children on to secondary and postsecondary education.

But for those left behind in inner cities life had become a cruel parody of what the civil rights movement had promised. Rather than finding new vistas and opportunities, inner city residents inhabited a place isolated from the social and economic changes going on in the wider world. As stock speculators and others reaped huge profits from the emerging globalized economy, the domestic divide between haves and have-nots only worsened. And, increasingly the clutches of the nation’s prisons and jails became the temporary or permanent home of the down-trodden.

By the early twenty-first century, the number of African Americans within the criminal justice system had reached unprecedented levels. Nearly half of the inmates in the nation’s prisons were African American, compared to their 13 percent share of the population, and one in fourteen adult black males was locked up in a prison or jail on any given day.

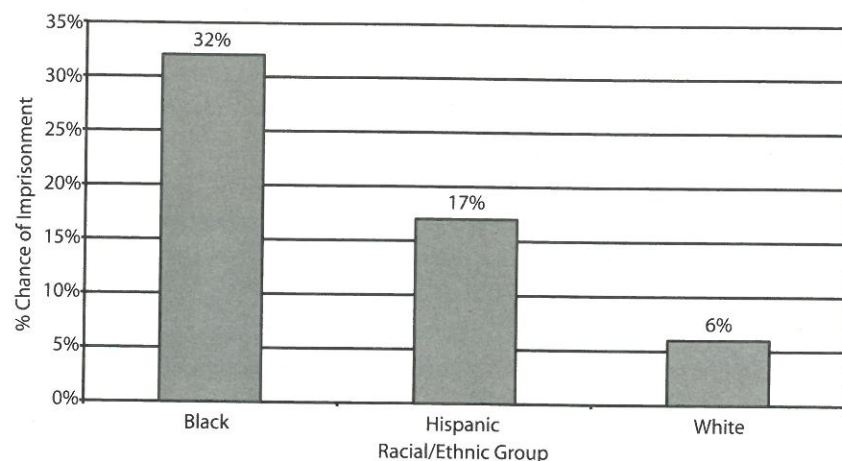
For young black men, the situation was far worse. A study by The Sentencing Project found that in 1989 nearly one in four black males in the age group 20-29 was under some form of criminal justice supervision on any given day—either in prison or jail, or on probation or parole. A follow-up study in 1995 then found that this figure had increased to almost one in three, a remarkable rise over a short period of time. Further, a black boy born in 2001 stood a 32 percent chance of being imprisoned at some point in his life, compared to a 17 percent chance for a Hispanic boy and a 6 percent chance for a white boy.

For black women, the absolute numbers were not quite as overwhelming, but the trends were at least as disturbing. From 1985 to 2000, there was a 267 percent growth in the number of black women in federal and state prisons, considerably greater even than the 172 percent increase for black males or the 158 percent increase in the overall inmate population.

As if this weren’t enough, leading academics, political

Figure 7-1

Lifetime Likelihood of Imprisonment for Males Born in 2001



Source: Thomas P. Bonczar, "Prevalence of Imprisonment in the United States Population 1974–2001," Bureau of Justice Statistics, 2003

pundits, and members of Congress began to refer to this new generation of criminals as containing a group of "superpredators." The animal imagery is inescapable here; consider whether most people conjure up the image of a white teenager when thinking of a "superpredator." Hardly. But a baggy pants-wearing black kid with a handgun fits the bill perfectly. To many Americans, some combination of bad family, bad culture, or bad genes created this young thug whose behavior is presumably beyond the capacity of modern law or social science to improve.

RACIAL DISPARITY AND IMPRISONMENT

Since whites are in effect "underrepresented" in the prison population—that is, in a smaller proportion than in the popula-

tion as a whole—the black/white differential in incarceration is a ratio of more than seven to one. African Americans, therefore, have a seven times greater chance of being incarcerated than do whites.

In itself, this disparity does not tell us much. It is possible that African Americans commit seven times as much crime as whites, or perhaps seven times the rate of the more serious crimes that are likely to lead to a prison term. If that were the case, then one might conclude that the numbers in prison were related to social or economic factors, not that they are evidence of direct discrimination.

If we are to understand the means by which the disparities in imprisonment have developed, five areas of inquiry are most relevant: crime rates; criminal histories; racial bias in prosecution and sentencing; racial bias in responses to crime; and, criminal justice policy changes and their impact on African Americans.

1. Crime Rates

All things being equal, the most relevant factors that determine whether an offender will be sentenced to prison are the severity of the offense for which he or she is convicted and the offender's prior record. Thus, if African Americans exhibit higher rates of violent offending and/or have lengthier criminal histories than other groups, we would expect this to be reflected in the composition of the prison population.

For property crimes, African Americans constituted 27 percent of arrests in 2003, disproportionate to their share of the overall population. For violent crimes, though, black offending rates are considerably higher than for other groups, accounting for 37 percent of these arrests in 2003. As noted, arrest rates do not always correlate with crime rates (particularly for drug offenses), but they do provide a benchmark by which to assess

criminal activity. While these arrest ratios are disturbing, they have remained stable or declined for twenty-five years. (This is clearly a very different picture than one would gather from watching only the eleven-o'clock news on television. Even during the upsurge of black juvenile homicides in the late 1980s, a declining rate of homicide among black adults resulted in a stable rate overall for African Americans.)

The degree to which arrest rates may explain the racial composition of the prison population has been examined by criminologist Alfred Blumstein in two separate studies of the 1979 and 1991 state prison populations.¹⁰ Blumstein found that, with the critical exception of drug offenses, higher rates of crime (as measured by arrests) were responsible for most of the high rate of black incarceration. In the 1991 study, for example, he found that 76 percent of the higher black rate of imprisonment was accounted for by higher rates of arrest. The remaining 24 percent of disparity might be explained by racial bias or other factors.

The 24 percent figure may be alarming in itself. Suppose just 5 percent of the total incarceration were the result of racial bias: of the approximately 550,000 African American state prison inmates in 2001, about 27,500 would not be locked up absent this bias.

As Blumstein acknowledges, we need to be cautious as well about interpreting the remaining 76 percent of the black rate of imprisonment explained by higher arrest rates. For drug offenses in particular, as we shall see in detail in the next chapter, there is strong evidence that blacks are arrested far out of proportion to their actual use or sale of drugs. Therefore, as drug offenders represent a greater share of the prison population, the increased likelihood that blacks will be arrested and incarcerated for a drug offense means that a declining proportion of the prison population can be explained by higher rates of crime.

In another examination of the impact of arrest rates on

incarceration in the 1980s, sociologists Robert Crutchfield, George Bridges, and Susan Pitchford found that at a national level, higher black arrest rates accounted for 89.5 percent of racial disparity in imprisonment. As in the Blumstein studies, these authors used arrests as a proxy for crime rates. At the state level, though, the amount of disparity that could be explained by arrests varied significantly. In the northeast states, only 69 percent of racial disparity was accounted for by arrest, while in the north central states, fewer blacks were actually incarcerated than one would have predicted by just using arrest data.¹¹ Overall, this suggests that a variety of factors, which may include crime rates, law enforcement priorities, and sentencing legislation, may play a role in the degree of racial disparity in incarceration.

2. *Criminal Histories*

Prior criminal history is generally considered to be another explanation for some of the disparity in rates of imprisonment. Of course, whether one acquires a criminal record is itself very much a function of race, geographical location, and other factors.

For example, in recent years, many African Americans have become acquainted with the crime known as "Driving While Black." In different parts of the country, there is strong evidence regarding the propensity of police to stop black males while driving for alleged traffic violations. Often, the justification offered for these actions, based on supposed drug courier "profiles," is that they are necessary for apprehending drug traffickers. In Volusia County in central Florida, for example, researchers documented traffic stops made by local police in the late 1980s. Although African Americans and Hispanics represented only five percent of drivers on the county's highway, more than 70 percent of all drivers stopped were either African

American or Hispanic. Blacks and Hispanics were also stopped for longer periods of time than whites, and represented 80 percent of the cars that were searched following a stop.¹²

Not all traffic stop patterns are as stark as in Volusia County, but national data indicate that the consequences of these stops are particularly significant for people of color. A report by the Department of Justice finds that black drivers are stopped at about the same proportion as whites, but those who are stopped are three times as likely as whites to be searched.¹³ Even more striking is the fact that searches of white drivers are four times more likely to find criminal evidence than for blacks. So both on grounds of law enforcement efficiency and of racial fairness, such practices do a disservice to the whole community.

In a notable 1998 case in federal court, Judge Nancy Gertner imposed a sentence considerably below that called for in the sentencing guidelines for a black man convicted of being a "felon in possession of a firearm." The recommended guidelines sentence was based in part on the offender's prior convictions. But Judge Gertner's examination of these revealed that all were non-violent traffic offenses, such as driving with a suspended license. Since the license conviction was not accompanied by any other traffic offense that might have justified a police stop, Judge Gertner suspected that it and the other convictions were likely a result of racial profiling. Therefore the offender was more likely to acquire a criminal record than a white man engaging in similar behaviors.

3. *Racial Bias in Prosecution and Sentencing*

Few honest observers of the criminal justice system would contend that race never played a role in determining rates of conviction and incarceration. Nonetheless, some observers do suggest that in the modern era, racially biased decision-making has effectively been removed from the criminal justice system

or at least does not play a significant role. Thus, we see academic texts with titles such as *The Myth of a Racist Criminal Justice System*, citing statistical evidence to argue that race plays no significant factor in how offenders are treated in the system.¹⁴ These presentations generally fail to consider how the criminal justice system has come to operate in such an unbiased manner when bias is still frequently encountered in other institutions.

In fact, the influence of race can be seen very clearly in some areas of the criminal justice system. Death penalty sentences provide the most compelling evidence. A series of studies demonstrates that, controlling for a wide range of variables, the race of both victim and offender has a significant impact on the determination of a sentence of death as opposed to life in prison. David Baldus and colleagues, for example, found that murder defendants charged with killing whites faced a 4.3 times greater chance of receiving death than those charged with killing blacks.¹⁵

In one of the more remarkable rulings of the Supreme Court, the 1987 *McCleskey v. Kemp* decision upheld the constitutionality of these outcomes.¹⁶ Warren McCleskey, a black man convicted of the armed robbery of a furniture store and the killing of a white police officer in the course of the robbery, argued that since race has an overwhelming influence on the imposition of the death penalty, his sentence should be overturned. While not quarreling with the statistical evidence presented by McCleskey, the court ruled that overall statistical evidence of discrimination could not be presumed to necessarily have affected his particular case. In other words, patterns of statistical racial disparities were meaningless unless one could show specific evidence of discrimination based on race.

Such a determination is, of course, virtually impossible. Prosecutors do not state in court, nor do they necessarily believe, that they are seeking the death penalty because a black defendant killed a white person, nor do judges offer this as

their rationale for imposing the death penalty. In fact, it is far more likely that in the twenty-first century, in contrast to earlier times, patterns of discrimination reflect *unconscious* biases rather than blatant attempts to oppress African Americans.

Troublingly, the Supreme Court justices revealed a fear of opening up the sensitive issue of racial disparities in sentencing to public debate.¹⁷ What would be the consequence, the majority in the McCleskey case asked, of permitting this type of challenge? Would it throw "into serious question the principles that underlie our entire criminal justice system?"¹⁸ Would it also lead to claims challenging "unexplained discrepancies that correlate to membership in other minority groups and even to gender?"¹⁹ Perhaps burglars and other common criminals would then be free to contest their sentences due to racial bias? In his dissent, Justice Brennan writes that the majority's reasoning "seems to suggest a fear of too much justice."²⁰

While race clearly does play a role in some sentencing decisions, the mechanism by which it operates is more subtle than in previous times. In recent years, a variety of studies conducted on sentencing practices have attempted to establish whether minorities receive harsher sentences than whites. A number of these studies have found little difference in sentences meted out when controlling for relevant variables, particularly the severity of the offense and the offender's prior record. A 1990 RAND study, for example, concluded that offenders in California received generally comparable sentences regardless of race for most offenses.²¹ The one exception was in the area of drug sentences, a distinction we will turn to in more detail later.

Other research illuminates the complexity of these findings. One of the most sophisticated studies examined case processing and sentencing outcomes for persons arrested for a felony offense in New York State for the years 1990–92. Controlling for factors that included prior criminal history, gender, and county,

the researchers found that for the more serious offenses there was relatively little difference in the sentences handed out—although it was estimated that 300 black and Hispanic offenders who received prison terms would not have had they been white. But for property offenses and misdemeanors, minorities were considerably more likely to receive jail terms, resulting in an additional 4,000 sentences a year for minorities statewide.²² Similar results have been found in a study of felony sentencing in Detroit, where race had a significant effect on incarceration decisions in the less serious cases.²³

The key reason for these findings may lie in the use of discretion by the courts when sentencing offenders. Violent offenders regardless of their race or ethnicity are quite likely to be sentenced to prison. But for less serious offenders—for whom there is an option but no *obligation* to sentence to prison—prosecutors and judges make decisions in each case about whether an offender will receive six months in jail, for example, or be required to enter a treatment program and make restitution to a victim.

It would be a mistake simply to attribute the results of such studies to prosecutorial and judicial racist beliefs; in some jurisdictions a significant number of prosecutors and judges are minorities prosecuting and sentencing other minorities to terms of incarceration. The results instead stem from reasons that are various and subtle. Do white offenders bring greater resources, such as a private defense attorney, with them to court to convince decision-makers that a jail or prison term is not warranted? Do whites have greater access to expert psychiatric testimony, or can they afford to subsidize placement in a substance abuse treatment program? Or, is unconscious racism at play: do whites speak in a language and manner that is more comfortable to the decision-makers in the courtroom?

Conscious or unconscious racism *does* play a role in how courtroom practitioners make decisions in regard to people of

color. A study of probation presentence reports in juvenile court cases illustrates the means by which this comes about. Researchers analyzing the narrative descriptions of juvenile offenders in a county in Washington state found that probation officers tended to portray the delinquency of black youth as stemming from negative attitudinal and personality traits, while the behavior of white youth was viewed as being influenced by their social environment.²⁴ The consequences of such classifications for sentencing are quite significant. Presumably, the problems of white youth in the social environment—school or family problems—can be addressed through various interventions in the community. But the personality problems ascribed to black youth are far less amenable to such intervention, and therefore incarceration as a means of protecting the community comes to be seen as a more necessary response.

Finally, another causal factor of disparity may be the composition of jury pools, and the degree to which a defendant is tried by a jury of his or her peers. African Americans may be particularly disadvantaged in jury trials due to reduced representation. First, people with felony convictions are generally excluded from jury pools, and for a varying set of reasons, African Americans are more likely than other groups to fall into this category. Second, persons in minority neighborhoods may be less likely to appear in court for jury service. A study in Harris County (Houston), Texas, found that residents of the predominantly white, affluent neighborhoods were up to seven times more likely to show up for jury duty than persons in low-income, mostly minority neighborhoods.²⁵ The study did not investigate the reasons for the large disparity, but two factors that are likely to be part of the explanation are lack of confidence in the system in many communities of color and the fact that the financial hardship of jury service is more of a burden on low-income workers.

4. *Racial Bias in Responses to Crime*

One final problem associated with statistical analyses of the role of race in sentencing relates to the underlying assumptions behind sentencing policies themselves. In many jurisdictions around the country, minorities constitute two thirds or more of the defendants in many offense categories. To what extent are “get tough” sentencing policies a reflection of the race and ethnicity of those likely to be affected by such policies? As the hue of the defendant population changes, do legislators and judges set different sentencing standards?

In the realm of policy development, recent research suggests that this is precisely the case. A key study examined the degree of punitiveness expressed by Americans as a function of the extent to which they perceived crime as a “black” problem. That is, if crime is viewed as disproportionately committed by blacks, does that translate into greater support for harsher responses to crime? Among whites, the authors found strong support for this hypothesis, concluding that “racial typification of crime is a significant predictor of punitive attitudes toward crime,”²⁶ controlling for other factors. And certainly, there is no reason to believe this finding is any less true among white policymakers than among the white population overall.

We can see this as well in white support for the death penalty. One national survey concluded that “White support for the death penalty in the United States has strong ties to anti-black prejudice. For white people living in an all-white county, racial prejudice emerges as the strongest predictor of white death penalty support. . . . For their counterparts in more [racially] integrated counties, this effect is more than doubled.”²⁷

These dynamics translate directly into the world of sentencing and incarceration policy, as seen in a study that examined changes in state prison populations between 1971 and 1991.²⁸

The study concluded that by 1990, controlling for a variety of factors, the size of a state's black population was an even stronger predictor of the prison population than the rate of violent crime. The authors suggest that while these findings may reflect large-scale bias within the criminal justice system, they may also be a result of harsher sentencing policies and a greater commitment to prison construction in states with larger black populations.

The way in which officials employ different responses to offenders can be seen in the massive outbreak of criminal activity that occurs every year on April 15th. Millions of (presumably) otherwise law-abiding middle-class citizens file their tax returns with various embellishments. Some fail to report income, others exaggerate the extent of their charitable contributions or business expenses. For 2001, the IRS estimated underpayment of taxes of up to \$353 billion.²⁹ The vast majority of these infractions are never detected because the system assumes taxpayer honesty and the enforcement mechanisms are weak. For those violators who are detected, the matter is usually handled administratively. The offender is called into the IRS office and sternly told that he or she must pay the taxes due plus a stiff fine. Only in the most exceptional of circumstances are criminal prosecution and incarceration even contemplated.

The history of marijuana policy provides another example. In the first several decades of the 1900s, marijuana was perceived as a drug used only by blacks and Mexican Americans, with references to use by jazz artists in nightclubs in the "racy" parts of town. Malcolm X tells us in his autobiography of his frequent use during his hipster days. Harry Anslinger, head of the Federal Bureau of Narcotics for three decades, even kept a file on "Marijuana and Musicians." Whether or not this perception was wholly accurate, it no doubt contributed to such policies as the Boggs Act of the 1950s, penalizing first-time pos-

session of marijuana or heroin with a sentence of two to five years in prison.³⁰

By the 1960s, though, marijuana began to be widely used by the white middle class. College campuses were flooded with youthful pot smokers, often flaunting their defiance of the law with "smoke-ins" and other public activities. As many of these young people and others were arrested for marijuana offenses, public attitudes began to change quickly. Commissions established by Presidents Kennedy and Johnson questioned the prevailing assumption of a direct link between marijuana and violent crime or heroin use. Marijuana thus came to be perceived as a relatively harmless drug, one that was not addictive and did not particularly lead to other criminal behavior. By 1970, the Comprehensive Drug Abuse Prevention and Control Act differentiated marijuana from other narcotics and lowered federal penalties for possession of small amounts. Many states and localities began to revise their marijuana laws and policies; some jurisdictions all but decriminalized possession of small quantities, either through new statutes or deliberately lax law enforcement.

Even with these changes, differences in marijuana laws and enforcement policies continue, often with consequences for continuing racial disparity. In the city of Milwaukee, for example, possession of marijuana for many years was classified as a misdemeanor, whereas the same behavior in the suburbs was treated as an ordinance violation. Thus, the mostly nonwhite arrests in the city could result in jail time and a criminal record, while white offenders in the suburbs were issued a ticket and made to pay a fine.³¹

The point here is not whether one believes that marijuana is a dangerous drug or not; rather, it is how the public perception of the appropriate societal response was shaped by the composition of the user population. As whites became a larger

proportion of the user population and replaced blacks in the public image of the pot user, public policies changed rapidly in a more understanding and less punitive direction.

A study that a colleague and I conducted on societal responses to different forms of substance abuse illustrates this as well. The study examined the harm to society and the criminal justice response to two forms of substance abuse, drunk driving and drug possession.³² Both forms of substance abuse result in substantial numbers of arrests (1.8 million for drunk driving in 1990 and 700,000 for drug possession), as well as significant societal harm, which can be approximated by examining the number of deaths caused by each.

As of 1990, drunk drivers were responsible for approximately 22,000 deaths annually, while overall alcohol-related deaths approached 100,000 a year. Drug-related deaths, through overdose, AIDS, or the violence associated with the drug trade, were estimated at 21,000 annually.

In response to increasing concern about drunk driving and due to the efforts of advocacy groups such as Mothers Against Drunk Driving, most states adopted stiffer laws to punish drunk driving in the 1980s. Many states now have some form of mandatory sentencing for this offense, although this typically involves two days for a first offense and 2–10 days for a second offense. Often, a convicted drunk driver is permitted to perform community service rather than serve a jail term.

The “war on drugs,” though, has dramatically increased the number of drug arrests and made sentencing provisions harsher in most states. Drug possession arrests rose by 88 percent in the period 1980–90. Typical state penalties for drug possession (excluding marijuana) are up to five years for a first offense and one to ten years for a second offense.

Who are the individuals arrested for these offenses? Drunk drivers are predominantly white males, representing 78 percent of the arrests for this offense as of 1990. They are gener-

ally charged as misdemeanants and typically receive sentences involving fines, license suspension, and community service. Persons convicted of drug possession, though, are disproportionately low-income, and African American or Hispanic; they are usually charged with felonies and frequently sentenced to incarceration. Overall, the societal response to drunk drivers has generally emphasized keeping the person functional and in society, while attempting to respond to the dangerous behavior through treatment; for drug offenders, though, the response has primarily involved greater use of law enforcement and incarceration. At the same time, while drug treatment remains popular and available for middle-class drug users, it is in short supply for low-income persons.

We have already seen how sentencing practices in Western Europe are less harsh for some offenses than in the United States. In comparing the United States with Scandinavian nations, for example, many skeptics contend that the relatively humane sentencing policies of Scandinavia are due to the fact that these societies are more homogeneous. Precisely! Communities that feel a sense of commitment to their members are able to see the humanity of offenders despite their criminal behaviors and to see the potential for positive change in their lives.

5. Policy Changes and African Americans

Unlike in South Africa under apartheid or the pre-Civil Rights South, criminal justice policies of the past several decades in the United States have not consciously targeted the African American community for particularly harsh treatment. By failing to forecast the likely impact of criminal justice policies, though—that is, in not attempting to understand what should have been some very predictable outcomes—policymakers have been derelict.

The advent of the “get tough” movement in the 1970s in it-

self was bound to have a disproportionate impact on minority communities. With African Americans already representing 40 percent of the prison population in 1970, a doubling of the prison population was likely to have a substantial impact on the absolute number of imprisoned minorities, absent some dramatic changes in crime rates or criminal justice processing decisions.

A more profoundly consequential policy change was the shift from indeterminate to determinate sentencing. This change was the result not only of the "get tough" movement, but, as we've noted, concern regarding the potential for abuse of discretion inherent in any indeterminate sentencing system. Reformers believed that controlling this discretion would lessen disparities based on race or class.

In its milder forms, determinate sentencing took on the form of sentencing guidelines that kept judicial discretion within acceptable bounds but permitted departures for compelling reasons. Some of the state guidelines systems appear to have reduced, but not eliminated, unwarranted racial disparity.³³

The more restrictive versions of determinate sentencing included the federal sentencing guidelines that took effect in 1987 and the host of mandatory sentencing laws that removed judicial discretion for many drug and weapons offenses. Under the political slogan of "if you do the crime, you'll do the time," mandatory sentences held out the promise of certainty in punishment regardless of who the offender was. Theoretically, this could have led to reduced disparity in sentencing.

Theory bore only a slight relation to courtroom reality, though, because it was dependent on the notion that discretion could somehow be eliminated from the sentencing process. What seems to have been forgotten in this calculation was that the entire criminal justice process is predicated on the use of discretion. A whole host of decisions guide criminal justice actors—where police officers will patrol, whether to arrest kids

who are drinking underage or to inform their parents, whether to charge a shoplifting offense as a misdemeanor or a felony, whether to offer a plea or go to trial, and so on.

Legislators who trumpeted their support of mandatory sentencing also overlooked the critical role of the prosecutor in the sentencing process. While mandatory sentencing might require the judge to impose a certain sentence, it said nothing about how a prosecutor would charge a case, negotiate a plea, or make a recommendation on sentencing.

In many cases, prosecutors might offer a defendant charged with a drug offense carrying a mandatory five-year prison term a plea bargain to a lesser charge, carrying only two years of imprisonment upon conviction. Is this done because the prosecutor is "softer on crime" than the legislators who supported mandatory sentencing? Hardly. Rather, it represents the prosecutor's understanding of the reality of the courtroom process, which would collapse under its own weight were most cases not negotiated.

So discretion has not been eliminated from the system; rather, it has been transferred from the judge to the prosecutor. The implications of this movement for democracy are crucial: judicial discretion is exercised in an open courtroom subject to public scrutiny, but the exercise of prosecutorial discretion is conducted behind closed doors with little accountability.

One comprehensive examination of prosecutorial decision-making was an analysis of case processing conducted by the *San Jose Mercury News*. The study looked at 700,000 criminal cases that were matched by crime and criminal history of the defendant. The analysts concluded that "at virtually every stage of pretrial negotiation, whites are more successful than non-whites."³⁴ Of 71,000 adults with no prior record who were arrested on felony charges, one third of the whites had charges reduced to misdemeanors or infractions, while only one quarter of blacks and Hispanics received this disposition.

How these dynamics come about has been the subject of considerable speculation by scholars. It may be that prosecutorial bias is reflected in an unwillingness to offer favorable plea agreements to minorities; another possibility is that minority defendants may be less trusting of the system and therefore less willing to engage in the plea-bargaining process.

Bias may also play a role in the degree to which cases are vigorously pursued by the prosecution. A review of research in this area conducted by sociologists John Hagan and Ruth Peterson suggests that prosecutors stereotype cases according to case-specific characteristics, by making racially biased assessments of the credibility of the victim and offender as witnesses. Non-white victims tend to be considered less credible witnesses, while white victims, especially of nonwhite defendants, are considered highly credible.³⁵ Given that most crime is intraracial, committed against victims of the same race, these dynamics may actually benefit black defendants but penalize black victims in some cases.

Several studies have attempted to measure evidence of racial disparities resulting from or continuing under mandatory sentencing laws in the federal court system. A report by the Federal Judicial Center found that in 1990 blacks were 21 percent more likely and Hispanics 28 percent more likely than whites to receive a mandatory prison term for offense behavior that fell under the mandatory sentencing legislation.³⁶ A more comprehensive statistical analysis by the United States Sentencing Commission concluded that, for comparable behavior, whites were being offered plea bargains leading to outcomes falling below the level requiring a mandatory minimum sentence more often than blacks or Hispanics, although a reexamination by an analyst for the Justice Department concluded that these disparities were based on legally relevant case-processing factors.³⁷

A close look at the development of the federal sentencing guidelines also suggests the difficulty of eliminating nonracial forms of bias in the system. One of the original justifications for the guidelines was the intent to eliminate favored treatment for wealthier defendants. A doctor convicted of Medicaid fraud, for example, would no longer be able to offer to donate his medical services to the community as a means of escaping a stay in prison.

The first problem with this approach is its assumption that the justice system will pursue the crimes of the wealthy as zealously as those of the poor. There is little evidence that this has ever been the case. Even if this were true, there is a basic flaw in the premise that incarceration, rather than a nonprison sanction, should be the presumptive penalty for most offenders. Rather than exploring whether the community service and treatment sentences that white-collar offenders had received might be appropriate for at least some low-income offenders, the guideline promulgators decreed that virtually all offenders should go to prison.

Second, until overturned by the Supreme Court in 2005, the sentencing guidelines had created sharp restrictions on the background issues a judge was permitted to take into account at sentencing. This injured low-income and minority offenders more than wealthy ones. Sentencing Commission guidelines, for example, forbade reductions in sentence for "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing."³⁸

Narrowing judicial allowance for mitigating factors had a significant impact on women offenders, too. Law professor Myrna Raeder's analysis of federal sentencing concludes that the development of guidelines often assumes a "male" norm.³⁹ Women have traditionally received the benefit of consideration for having a secondary role in the commission of a crime or a

history of sexual or physical abuse. But when prior sentencing patterns—primarily based on male offenders—were calculated, these factors were deemed largely irrelevant.

Thus, the sentencing policies of recent years, whether motivated by a desire to “get tough” or to reduce disparity, or merely reflecting white racism, have in practice unfairly affected low-income people and minorities. Had these been the only changes in criminal justice policy, the impact would have been regrettable enough. The inauguration of the “war on drugs,” though, made these policies pale in significance.

8

The War on Drugs and the African American Community

Sure, it's true we prosecute a high percentage of minorities for drugs. The simple fact is, if you have a population, minority or not, that is conducting most of their illegal business on the street, those cases are easy pickings for the police.

—Delaware Prosecutor Charles Butler¹

Picture this scene in any middle-class suburb in the United States: students at the local high school, a “good” school with high graduation rates and college acceptances, have been getting into trouble. Nothing too serious, but some drug use, some underage drinking, and a few smashed cars here and there. Parents are cautioned by the principal to check with their kids for signs of trouble.

The parents of one 17-year-old boy had already been concerned about possible drug use, and examine their son's bedroom while he is at school. They discover what appears to be some drug residue and a substantial amount of cash hidden in a drawer. Confronting their son when he comes home, he admits he has been using cocaine and occasionally selling to some friends.

How do the parents respond? Do they call up the police, demand that their son be arrested for using and selling drugs, and receive a five-year mandatory minimum sentence for his behavior? The question is ludicrous, of course.